BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. LOS ANGELES UNIFIED SCHOOL DISTRICT.	OAH Case No. 2015060909

DECISION

Parent on behalf of Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on June 12, 2015**,** naming Los Angeles Unified School District. The matter was continued for good cause on July 8, 2015.

Administrative Law Judge Chris Butchko heard this matter in Van Nuys, California, on September 1, 2015.

Jennifer Guze Campbell and Sarah Spacht, Attorneys at Law, represented Student. Student's mother attended the hearing, as did Student's advocate Jim Campbell.

Patrick Balucan, Attorney at Law, represented District. Diana Massaria, Administrative Coordinator for Due Process, attended the hearing on behalf of District.

A continuance was granted for the parties to file written closing arguments and the record remained open until September 25, 2015. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

ISSUES[1]

1) Following Parent's request for an independent educational evaluation on April 7, 2015, did District fail, without unnecessary delay, to either file a due process complaint to show that its evaluation was appropriate or provide an independent educational evaluation at public expense?

2) If so, did District's failure deny Student a free and appropriate public education by significantly impeding Parent's opportunity to participate in the decision making process regarding Student's education?

SUMMARY OF DECISION

District defended its assessment on April 9, 2015, by initiating OAH Case No. 2015040570. Although District withdrew its case following hearing on that matter but before a decision was issued, no unnecessary delay was incurred. Similarly, District's proffer of a list of suggested evaluators did not delay Student's exercise of his right to an independent educational evaluation. There was no denial of a FAPE.

FACTUAL FINDINGS

1. Student is a 5-year-old male who resided in District at all relevant times, and is eligible for special education under the category of autistic-like behaviors.

2. Student's initial IEP was created on April 21, 2014. His services included language and speech therapy, resource specialist program, and a behavior support plan.

3. Megan Panatier conducted a subsequent language and speech and augmentative alternative communication device assessment of Student. Her professional title indicates that she has a master of science degree with a Certificate of Clinical Competence in Speech Language Pathology.

4. Ms. Panatier's assessment report found that Student had met his last IEP's goals and "has made excellent progress." The report concluded that Student did not meet the eligibility criteria for speech and language impairment.

[1] The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

5. The assessment stated that it was based on a teacher interview, classroom observations, clinical observations, and standardized assessments. Ms. Panatier administered the Goldman Fristoe Test of Articulation, the Expressive One Word Picture Vocabulary Test, and the Preschool Language Scales to Student.

6. Student's scores on the Goldman Fristoe test were in the 31st percentile. His scores in the Expressive One Word Picture Vocabulary Test were above the 50th percentile. Student placed in the 9th percentile on the Preschool Language Scale. Ms. Panatier believed that the Preschool Language Scale raw score and percentile were not "his true scores" because of "distractibility and silliness."

7. Ms. Panatier checked a box in the report form to state that "Student was cooperative and the assessment results are a valid indicator of student performance." The report stated that Student was "above average in all speech and language areas" and found that "[t]he student does not demonstrate a need for Language and Speech (LAS) support."

8. Ms. Panatier's report, dated January 27, 2015, was presented and discussed at IEP team meetings on February 3, 2015, and February 17, 2015.

9. District personnel on the IEP team determined that Student no longer qualified for language and speech services. Parent disagreed with that conclusion, and did not consent to the IEP.

10. Parents objected to Ms. Panatier's assessment by letter dated April 8, 2015. Parent requested an independent educational evaluation in the area of language and speech.

11. Parent's April 8, 2015 letter states that Ms. Panatier's assessment failed to accurately reflect Student's abilities in articulation, pragmatics, and intelligibility; that the assessment was not valid due to Student's behaviors during the assessment; that the assessment was internally contradictory about Student's ability level; and that the assessment did not address Parents' concerns.[2]

12. On April 9, 2015, District filed OAH Case No. 2015040570 (the "first case") to defend Ms. Panatier's assessment.

13. The matter went to hearing on June 2, 2015. ALJ Laurie Gorsline, presiding, granted a continuance to June 12, 2015, for the submission of final briefing.

14. On June 10, 2015, prior to the filing of any closing briefs, District filed a request to withdraw its due process hearing request.

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[2] Counsel's briefing also states that Parent objected to the assessment because it did not assess Student "in all areas of suspected disability." That claim is undefined and does not appear in the April 8, 2015 letter.

15. On June 11, 2015, Student filed a declaration by counsel that opposed District's request to withdraw the matter and in support of a motion for "fee shifting expenses." No separate motion appears in the case file.

16. On approximately June 11, 2015, District sent a letter to Parent stating that, "per your request," Student would receive an independent educational evaluation at public expense. In that letter, District listed three assessors "from which you may choose to conduct the assessment." Parent did not respond to that letter other than through litigation.

17. On June 12, 2015, Student filed his final brief in the first case. In closing, Student urged OAH to find that the assessment was not appropriate and "order District to fund an independent educational evaluation in the area of speech and language, with the evaluator of Student's choosing."

18. Student initiated OAH Case No. 2015060909 ("this action") on June 12, 2015, asserting that District had failed to either file to defend its assessment or grant an independent educational evaluation without unreasonable delay.

19. District replied to Student's opposition to its motion to withdraw the action on June 17, 2015.[3] District argued that it should be allowed to withdraw the action because it "had taken the necessary steps to indicate its agreement to fund the [independent evaluation]."

20. District asserted that it should not be subjected to fee shifting because it had not acted in bad faith or engaged in tactics that were frivolous or solely intended to cause unnecessary delay. Its decision to withdraw the action was "based on an evaluation of the merits of the proffered testimony and evidence at the hearing." District also stated that its decision to withdraw the action, rather than await a decision by the ALJ, meant that Student would have access to an independent educational evaluation sooner.

21. Student filed a sur-reply on June 18, 2015. In that brief, Student cited the requirement under title 34 Code of Federal Regulations part 300.502(a)(2) that District inform him "where an independent educational evaluation may be obtained, and the agency criteria applicable for independent educational evaluations…." Student allowed that District may present a list of approved assessors, but may not require him to choose solely from that list, as "[t]he parent, not the District, has the right to choose the assessor." Student believed an active controversy existed between District and himself.

[3] Page 2 of District's brief in the first case was omitted in the filing and has not been subsequently supplied.

22. Student's counsel acknowledged being aware of District's offer by June 16, 2015. Student's counsel took the position in its sur-reply that District's offer was misleading, as the "seemingly permissive" language of the offer "implies that District will only work with one of those three assessors[,] in violation of [independent evaluation] law and policy."

23. ALJ Gorsline granted District's request to withdraw the action by order dated June 19, 2015. Because the hearing had commenced prior to the request to withdraw, ALJ Gorsline entered the dismissal with prejudice to refiling.

24. ALJ Gorsline found that Student failed to demonstrate that District engaged in bad faith actions or tactics that were frivolous or solely intended to cause unnecessary delay to justify an award of sanctions, and declined to impose fee shifting as a sanction. She noted that her order did not preclude Student from seeking an award of attorney's fees for that action in a court of competent jurisdiction.

25. Student's counsel had not, as of the time of the hearing in this matter, sought an award of attorney's fees in the appropriate court for the first case, and was aware that the time had not run to so do.

26. Parent's preferred provider for the independent educational evaluation is a female speech and language pathologist based in Pasadena. Parent never proposed to District a specific person to conduct the independent educational evaluation.[4]

LEGAL CONCLUSIONS

Introduction: Legal Framework under the IDEA[5]

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)[6] et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education

[4] Student's counsel asserts in briefing that a specific assessor was identified to District at the mediation of this action. All statements in a mediation are confidential.

[5] Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

[6] All subsequent references to the Code of Federal Regulations are to the 2006 version.

and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's individualized education program. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.].) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit" or "meaningful educational benefit," all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502,

56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387] (*Schaffer*); see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].)

Burden of Proof

5. Student, as the party petitioning for relief, has the burden of proving the essential elements of its claim. (*Schaffer, supra,* 546 U.S. at p. 62.)

Assessments

6. Before any action is taken with respect to the initial placement of a special education student, an assessment of the student's educational needs shall be conducted, with subsequent assessments at least once every three years. (Ed. Code, § 56320; Ed. Code, § 56381, subd. (a).) No single procedure may be used as the sole criterion for determining whether the student has a disability or determining an appropriate educational program for the student. (20 U.S.C. § 1414 (b)(2)(B); Ed. Code, § 56320, subd. (e).)

7. Tests and assessment materials must be administered by trained personnel in conformance with the test instructions and provide relevant, accurate, information as to Student's unique needs, and in all areas of suspected disability. (20 U.S.C. § 1414(b)(3)(A)(iii)-(v); 34 C.F.R. § 300.304(c)(7); Ed. Code, § 56320, subd. (b)(2), (3); Ed. Code, § 56320, subd. (d); Ed. Code § 56320, subd. (c), (f).) Assessments must be conducted by individuals who are both "knowledgeable of [the student's] disability" and "competent to perform the assessment." (Ed. Code, §§ 56320, subd. (g), 56322; see, 20 U.S.C. § 1414(b)(3)(A)(iv).)

8. Tests and assessment materials must be validated for the specific purpose for which they are used; must be selected and administered so as not to be racially, culturally, or sexually discriminatory; and must be provided and administered in the student's primary language or other mode of communication unless this is clearly not feasible. (20 U.S.C. § 1414(a)(3)(A)(i)-(iii); Ed. Code, § 56320, subd. (a).)

9. The personnel who assess the student shall prepare a written report that shall include, without limitation, the following: 1) whether the student may need special education and related services; 2) the basis for making that determination; 3) the relevant behavior noted during observation of the student in an appropriate setting; 4) the relationship of that behavior to the student's academic and social functioning; 5) the educationally relevant health, development and medical findings, if any; 6) if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage; and 7) consistent with superintendent guidelines for low-incidence disabilities (those affecting less than one percent

of the total statewide enrollment in grades K through 12), the need for specialized services, materials, and equipment. (Ed. Code, § 56327.) The report must be provided to the parent at the IEP team meeting regarding the assessment. (Ed. Code, § 56329, subd. (a)(3).)

Notice

10. Under Education Code section 56500.4, subdivision (a), a district is required to give parents of a child with exceptional needs prior written notice a reasonable time before the district proposes to initiate or change, or refuses to initiate or change, the identification, assessment, or educational placement of the child, or the provision of a free appropriate public education to the child. The prior written notice must contain: (1) a description of the action proposed or refused by the agency; (2) an explanation for the action; and (3) a description of the assessment procedure or report which is the basis of the action. (Ed. Code, § 56500.4, subd. (b).) The procedures relating to prior written notice "are designed to ensure that the parents of a child with a disability are both notified of decisions affecting their child and given an opportunity to object to these decisions." (*C.H. v. Cape Henlopen School Dist*. (3rd Cir. 2010) 606 F.3d 59, 70.) When a failure to give proper prior written notice does not actually impair parental knowledge or participation in educational decisions, the violation is not a substantive harm under the IDEA. (*Ibid*.)

Independent Educational Evaluation

11. Under certain conditions, a student is entitled to obtain an independent evaluation at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1)(2006); Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an independent evaluation as set forth in Ed. Code, § 56329]; see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an independent evaluation].) "Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." (34 C.F.R. § 300.502(a)(3)(i).) To obtain an independent evaluation, the student must disagree with an evaluation obtained by the public agency and request an independent evaluation. (34 C.F.R. § 300.502(b)(1), (b)(2).)

12. When a student requests an independent evaluation, the public agency must, without unnecessary delay, either file a request for due process hearing to show that its assessment is appropriate or ensure that an independent evaluation is provided at public expense. (34 C.F.R. § 300.502(b)(2); Ed. Code, § 56329, subd. (c).)

13. Whether a district filed its due process hearing request without "unnecessary delay" is a fact specific inquiry. In *Pajaro Valley Unified School Dist. v. J.S.* (N.D. Cal. Dec. 15, 2006, C06-0380 PVT) 2006 WL 3734289 (*Pajaro Valley*), a student requested an independent evaluation. The district waited three weeks and then demanded that the pupil renew the request, warning that it was "prepared" to go to due process to defend its assessments. After the student complied, District waited another eight weeks before filing

for due process. In total, the district waited three months after student first requested an independent evaluation to file to defend the assessment. The court found that the school district's "unexplained and unnecessary delay in filing for a due process hearing waived its right to contest Student's request for an independent evaluation at public expense, and by itself warranted entry of judgment in favor of Student and [parent]." (*Id*. at p. *3.)

14. The term "unnecessary delay" as used in title 34 Code of Federal Regulations part 300.502(b)(2) is not defined in the regulations. It permits a reasonably flexible, though normally brief, period of time that could accommodate good faith discussions and negotiations between the parties over the need, and arrangements, for an independent evaluation. (*Letter to Anonymous,* 56 IDELR 175 (OSEP 2010).) Some delay in acting is reasonable if the school district and the parents are engaging in active communications, negotiations or other attempts to resolve the matter. (*J.P. v. Ripon Unified Sch. Dist.* (E.D. Cal. April 14, 2009, No. 2:07-cv-02084) 2009 WL 1034993.) In *L.S. v. Abington School Dist*. (E.D. Pa. Sept. 28, 2007, Civil No. 06-5172) 2007 WL 2851268, the court found that a 10-week period before the school district filed its due process complaint was not an unnecessary delay, given the school district's ongoing efforts to resolve the matter during that period, including the exchange of numerous emails, as well as the convening of a resolution session. (*Id*. at pp. *8-10.) The determination of whether "unnecessary delay" has been incurred is a fact-specific inquiry. (See *Pajaro Valley*, *supra,* *3.)

15. School districts may establish criteria to ensure that public funded independent evaluations are not unreasonably expensive. (*Letter to Wilson*, 16 IDELR 83 (OSEP October 17, 1989).) Public agencies should not be expected to bear the costs of independent evaluations where those costs are clearly unreasonable. (*Letter to Kirby*, 213 IDELR 233 (OSEP 1989).) (*Kirby*) To avoid unreasonable charges for independent evaluations, a district may establish maximum allowable charges for specific tests. (*Ibid*.) If a district does establish maximum allowable charges for specific tests, the maximum cannot be an average of the fees customarily charged in the area by professionals who are qualified to conduct the specific test. (*Ibid*.) The maximum must be established so that it allows parents to choose from among the qualified professionals in the area and only eliminates unreasonably excessive fees.(*Ibid*.)

16. School districts must provide parents with information about where the independent evaluation may be obtained, as well as the school district criteria applicable for independent evaluations. (34 C.F.R. § 300.502(a)(2) ; see *Letter to Bluhm*, 211 IDELR 2237A (OSEP 1980).) A district may provide a parent with a list of pre-approved assessors, but there is no requirement that the parent select an evaluator from the district-created list. (*Letter to Parker*, 41 IDELR 155 (OSEP 2004).) (*Parker*) When enforcing independent evaluation criteria, the district must allow parents the opportunity to select a qualified evaluator who is not on the list but who meets the criteria set by the public agency. (*Ibid*.)

17. When enforcing reasonable cost criteria, the district must allow parents the opportunity to demonstrate that unique circumstances justify an independent evaluation that does not fall within the school district's criteria. (*Kirby, supra,* 213 IDELR 233.) If an

independent evaluation that falls outside the district's criteria is justified by the child's unique circumstances, that evaluation must be publicly funded. (*Ibid*.) Where the only person qualified to conduct the type of evaluation needed by a child does not meet agency criteria, the public agency must ensure that the parent still has the right to the evaluation at public expense and is informed about where the evaluation may be obtained. (*Parker, supra*, 41 IDELR 155.)

18. A district's violation of its obligation to assess a student is a procedural violation of the IDEA and the Education Code. (*Park v. Anaheim Union High School District, et al*. (9th Cir. 2006) 464 F.3d 1025, 1031-1033.) Procedural violations of the IDEA only constitute a denial of FAPE if they: (1) impeded the student's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2); see *N.B. v. Hellgate Elementary School Dist*., (9th Cir. 2008) 541 F.3d 1202, 1208, quoting *Amanda J. ex rel. Annette J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 892.) A procedural violation may be harmless unless it results in a loss of educational opportunity or significantly restricted parental participation. (*L.M. v. Capistrano Unified School Dist*. (9th Cir. 2009) 556 F.3d 900, 910.)

Issue 1: *District's response to Parent's Request for Independent Educational Evaluation*

19. Student requested an independent evaluation on April 8, 2015, and District filed for due process the next day. District did not delay in filing for due process in response to Student's request for an independent evaluation.

20. On June 10, 2015, after the completion of the hearing, but before final briefing was completed or a decision rendered, District moved to withdraw its due process hearing request. Student opposed allowing District to withdraw. ALJ Gorsline granted the request, but ruled that the withdrawal was with prejudice to District's ability to file again to defend the assessment. Code of Civil Procedure section 581, subdivision (e) permitted District to choose to withdraw its action after filing and going to hearing, but before a decision was rendered.

21. District sent a letter on June, 11, 2015, informing Student of its decision to grant him an independent evaluation and listing providers "from which [he] may choose" to conduct the evaluation. A district may give a list of pre-approved assessors in its offer of an independent evaluation, but may not deprive a student of the right to choose the assessor. Student's counsel was aware that Student had the ultimate right to select the person to conduct the independent evaluation. District's letter did not limit Student's choice of evaluators to those listed in the letter.

22. District's letter was prior written notice of its proposal to fund an independent evaluation of Student. Student's contention that District should have given another prior written notice of its decision to grant an independent evaluation invites an infinite recursive

loop of notices, as it could be argued that District should also give prior notice of its decision to notify Student. District's letter notified Parent of its decision affecting her child and provided her with an opportunity to object to the decision, which she took.

23. The letter was not, as Student asserts, "meant to serve as an offer to settle the matter." It offered an independent evaluation and followed District's withdrawal of the due process action. The offer was not conditioned on any outcome of the due process hearing.

24. Student contends that he was not offered his choice of independent evaluators because District did not provide him with the criteria District would use in determining whether Student's choice of evaluators would be acceptable to District. District has produced no evidence that it supplied this information to Student.

25. District's failure to set out its criteria for assessors is not to blame for the fact that Student has not received an independent evaluation. Unlike other cases where a district rejects a student's choice of assessors without explanation, the failure to have Student assessed has no relation to the criteria for assessors. If Student's nominee had been rebuffed without an expressed justification, Student could argue that it would have been pointless to pick another assessor without knowledge of District's criteria. The facts here are otherwise.

26. Student requested an independent evaluation in April, 2015. After completing the hearing in the first case in June 2015, Student still had not settled upon an assessor. Student did not respond in any way other than by the filing of this action to District's offer of an independent evaluation. Student was represented by informed, experienced counsel, and District cannot be chargeable for Student's delay in obtaining his choice of an independent assessor when Student has failed to ask for her.

27. Although District committed a procedural violation,[7] it was in fact harmless. Nothing in the record connects the procedural violation to Student's decision not to propose an independent evaluator. Student has not expressed any reason why he was concerned that his evaluator might not be acceptable to District. It is inconceivable, as well, that Student's counsel, having just completed a hearing on this issue with District, would be unaware of how to ascertain if a specific assessor was acceptable to District. The violation did not deprive Student of educational opportunity or limit parental participation in his educational progress.

28. Were Student to prevail here, he would obtain by order the same outcome he was offered by District's letter. The name of Student's preferred assessor is not in the prayer for relief and was not mentioned at hearing. Student could again decline to nominate an assessor, and if District did not provide Student with a statement of its criteria for assessors,

[7] Student also asserts that District committed another violation in failing to hold a resolution session. Student's charge is unspecific. No resolution session needed to be held in the first case, as resolution sessions are not held in District-filed actions.

the same logic would hold again that District is responsible for the delay. Lacking any evidence that ignorance of District's criteria hindered Student's ability to pick an assessor, the violation must be found harmless.

29. Student's final contention is that District acted to "string parents along," wasting time and resources by defending an indefensible assessment only to drop the action at nearly the last possible minute.

30. If District had deliberately pursued a meritless cause of action in defending its assessment, any delay incurred would be by definition unnecessary. District filed its case to defend its assessment the day after Parent's April 8, 2015 independent assessment request, and then two months later changed gears and offered Parent the independent evaluation on June 11, 2015, after withdrawing its hearing request. District, having filed to deny Student his assessment the day after his request, cannot argue that the litigation delay should be excused as part of active communication, negotiation, or good faith discussions intended to resolve the matter, as in *Ripon*. The fact that District abandoned its case without waiting for the ALJ's decision is evidence of the weakness of its defense of the assessment.

31. However, District's defense of the assessment was not clearly meritless. The assessment was conducted by a trained and educated person who used a variety of proper tests and assessment materials, which were selected and administered in a nondiscriminatory manner. The resulting written report appears comprehensive and thorough, and was appropriately shared with Parent and the IEP team.

32. Student's initial objections to the assessment were that it failed to accurately reflect Student's speech abilities, was invalidated by Student's behaviors during the assessment, was internally contradictory, and did not address Parent's concerns about Student. District could initially interpret these complaints not as statutory deficiencies, but as qualitative objections. However, Student's challenge to the assessment is not limited to the issues raised in Parent's April 8, 2015 letter as there is no requirement that Student explain its deficiencies to obtain an independent evaluation. District may not have realized the depths of the flaws in its assessment prior to the hearing, and only became aware during the hearing itself.

33. Student argues that District should not be allowed to withdraw its defense at the 12th hour. He has not, however, explained why that should be so. District has argued that its withdrawal speeded the date on which Student could have obtained his assessment, since he did not need to wait for OAH to issue its decision in the matter and an evaluation could have been completed by now.

34. Although a hearing did take place, there was a meaningful savings of time due to District's withdrawal of its defense of the assessment since the decision would have been issued in mid-July. Further, that decision would have given Student no more relief than what occurred by District's withdrawal and offering of an independent assessment. No argument has been made that there is any benefit that would accrue to the parties or the system by

discouraging parties that recognize the substantial risk of losing from dropping their actions. On the contrary, settlements are favored at any phase. Accordingly, as there is no evidence that District began its assessment defense in bad faith, there is no reason to prevent it from, or penalize it for, dropping it.

35. District did not unnecessarily delay in defending its assessment or deciding to grant an independent educational evaluation.

Issue 2: Student's Access to a Free and Appropriate Public Education

36. Having found that District did not act with unnecessary delay to establish a procedural violation, it must also be found that District did not deny Student a FAPE.

ORDER

All relief sought by Student is denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, District was the prevailing party on all issues presented.

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

DATED: November 5, 2015

/s/

CHRIS BUTCHKO
Administrative Law Judge
Office of Administrative Hearings